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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 566

MORRISON-KNUDSEN COMPANY, INC., THE HENRY J. KAISER COMPANY, PUGET SOUND BRIDGE & DRYDOCK COMPANY, and GENERAL CONSTRUCTION COMPANY, d/b/a MORRISON-KAISER-PUGET SOUND-GENERAL,
Appellants,

vs.

STATE OF WASHINGTON, a sovereign state, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

STUART G. OLES
SETH W. MORRISON
Attorneys for the Appellant.
1308 Northern Life Tower
Seattle, Washington 98101

GERALD DEGARMO
HARRY R. VENABLES
Of Counsel

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vs.	
STATE OF WASHINGTON, a sovereign state, *Appellee*.	

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment of the Supreme Court of the State of Washington signed on April 2, 1964 reversing a decision of the Superior Court of the State of Washington for Thurston County and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Washington is reported in 64 Wash. Dec. 2d 105, 390 P.2d 554. The opinion of the Superior Court of the State of Washington for Thurston County, and Orders

Nos. 59-15 and 60-64 of the Tax Commission of the State of Washington are not reported. Copies of the opinion of the Supreme Court of the State of Washington, the Order denying appellants' Petition for Rehearing and Remittitur, as well as copies of the Memorandum Opinion, Findings of Fact and Conclusions of Law, and Judgment of the trial court and copies of Tax Commission Orders Nos. 59-15 and 60-64 are attached hereto as Appendix A.

JURISDICTION

This suit was brought under § 82.32.180 of the R.C.W. to set aside an assessment and obtain a refund of Business and Occupation taxes, as well as to set aside a Compensating Use Tax assessed by the State of Washington on the ground that the statutes under which such taxes are levied were unconstitutional as applied to these appellants in that they were discriminatory and denied appellants equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution. The Judgment of the Supreme Court of the State of Washington was dated April 2, 1964. Petition for Rehearing was denied by Order filed May 26, 1964, and Judgment was entered that day. Notice of Appeal was filed August 12, 1964 in the Supreme Court of the State of Washington. The jurisdiction of the Supreme Court of the United States to review the Judgment on direct appeal is conferred by 28 U.S.C. § 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the Judgment on direct appeal: *Quaker Cab Co. v. Penn*, 277 U.S. 389; *Concordia Fire Insurance Co. v. People*

of the State of Illinois, 292 U.S. 535; *Walkers v. City of the State of Illinois,* 292 U.S. 535; *Walters v. City*

STATUTES INVOLVED

The validity of the following statutes is involved: (1) with respect to the Business and Occupation Taxes, R.C.W. 82.04.110; R.C.W. 82.04.120; R.C.W. 82.04.130; R.C.W. 82.04.190; R.C.W. 82.04.240; R.C.W. 82.04.250; R.C.W. 82.04.270; R.C.W. 82.04.280 and R.C.W. 82.04-.440; (2) with respect to Compensating Use Tax, RC.W. 82.04.050; R.C.W. 82.04.190, R.C.W. 82.08.010, R.C.W. 82.12.010 and R.C.W. 82.12.020. The full text of said statutes are set forth in Appendix B.

QUESTIONS PRESENTED

1. May a State classify those general contractors who are awarded contracts to build or improve public roads or bridges as a business separate from all other contract construction businesses and tax such "public road contractors" both for the privilege of "manufacturing" components for a particular bridge and also for the privilege of constructing the bridge, when every other general contractor is taxed, with respect to identical activities undertaken for a private concern or person, only once as a "wholesaler" or "retailer"; or is the classification "public road contractor" invidiously discriminatory and therefore repugnant to the 14th Amendment of the United States Constitution when persons within the class are singled out for double taxation to which other contractors are not subject.

2. May a State classify those general contractors who are awarded contracts to build or improve public

roads or bridges as "consumers" of all materials incorporated by them in a "public" bridge and assess a Compensating Use Tax against such contractors when every other contractor is excluded from the classification of "consumer" and exempt from paying Compensating Use Taxes on materials incorporated in similar construction projects contracted for by private concerns or persons; or is the classification of "public road contractors" as "consumers" invidiously discriminatory and therefore repugnant to the 14th Amendment to the United States Constitution when "public road contractors" are thus singled out for a tax other contractors are not required to pay on identical activities.

STATEMENT OF THE CASE

All four appellants are general contractors. They formed a Joint Venture to bid upon and were awarded the contract for the construction of the Hood Canal Bridge in December, 1957. Under this contract appellants partially constructed twenty-three pontoons or floating segments, forty-four anchor shells and two steel transition spans at a graving dock and at other locations in Seattle a considerable distance from the actual bridge site on Hood Canal. Thereafter these partially completed floating segments, anchor shells and steel transition spans were towed to a storage yard on Port Gamble Bay approximately one and one-half miles from the bridge site from which place a portion of the pontoons, the steel transition spans and a portion of the anchor shells were towed to the bridge site and connected to form a part of what was ultimately intended to be Hood Canal Bridge. Before the structure of the bridge could

be completed and all pontoons and anchor shells fastened in place storms occurring in December, 1959 and January, 1960 so severely damaged the partially completed bridge as to demonstrate that the design of the bridge was inadequate and that substantial modifications and changes in the pontoons and anchors would be necessary before a finished bridge structure could be achieved. At this point the contract of appellants for the construction of the bridge was terminated by mutual agreement with the State of Washington and a contract for the changes in design was let by the State of Washington to another contractor.

Commencing in 1958, the appellants reported their gross receipts to the Washington State Tax Commission under the Business and Occupation Tax classification "Public Road Contractor" (R.C.W. 82.04.280) and paid an aggregate of $95,383.71 in Business and Occupation Taxes on their gross receipts for the period from January 1, 1958 through September 30, 1959. The Tax Commission staff ruled that appellants were also liable for an additional Business and Occupation Tax as "manufacturers" (R.C.W. 82.04.110, R.C.W. 82.04.120 and R.C.W. 82.04.240) of the pontoons, anchor shells and transition spans measured by the cost of constructing them The Tax Commission staff also ruled that a Compensating Use Tax was due from the appellants for the privilege of exercising dominion over the partially constructed pontoons, anchor shells and transition spans (R.C.W. 82.12.010, R.C.W. 82.12.020 and R.C.W. 82.04.190). The measure of the Compensation Use Tax

was the cost or value of the components and materials "used."

Appellants appealed the ruling of the Tax Commission staff to the Tax Commission which, by Order No. 59-15, dated April 23, 1959, held:

> "The taxpayer is instructed to report, in addition to the Business and Occupation Tax under the classification 'Public Road Construction,' both the Manufacturing and Compensating Taxes on the full manufactured value, which includes materials and the labor of preparation, of the floating pontoons constructed in Seattle. All other similar manufacturing activities also must be reported in the same fashion."

On February 11, 1960, Tax Assessment No. 103587 was issued by the Washington State Tax Commission assessing against these appellants additional Business and Occupation and Compensating Use Taxes in the aggregate principal amount of $242,896.75. Appellants appealed this tax assessment to the Tax Commission which, by Order No. 60-64 dated April 20, 1960, denied the taxpayer's appeal except that certain minor revisions were directed to be made in the determination of the value of certain articles for the purpose of the Manufacturer's Business and Occupation Tax and for the purpose of a Compensating Use Tax. Following the issuance of Order No. 60-64, Tax Assessment No. 106869 was issued on June 30, 1960, assessing additional Business and Occupation and Use Taxes at $225,866.75, exclusive of interest. Appellants paid $100,462.72 of the additional assessment under protest, then sued to recover the amount paid and to set aside both tax assess-

ments in the Superior Court of the State of Washington for Thurston County.

How the Federal Question Was Presented: Appellants questioned the constitutionality of the additional assessments and the constitutionality of the statutes under which said additional assessments were levied on the ground that both the assessments and the statutes, as applied, were repugnant to the United States Constitution and the Fourteenth Amendment thereof, at each stage of this proceeding subsequent to the issuance of Assessment No. 103587 on February 11, 1960. The Federal Question was raised on appeal to the Tax Commission from Assessment No. 103587 and at the hearing of such appeal held April 20, 1960. In Order 60-64, dated June 20, 1960 the Tax Commission disposed of the Federal Question as follows:

> "We find that the taxpayer has engaged in activities taxable under the 'Manufacturing' classification of R.C.W. 82.04.240 and the taxpayer's contract also involves activities which make it taxable as a public road contractor under R.C.W. 82.04.280. Its activities being within the purvue of these two sections, it is proper and necessary that the Tax Commission impose the tax under both classifications. Such pyramiding of the Business and Occupation Tax is not unconstitutional. *Drury The Tailor v. Jenner,* 12 Wn.(2d) 508."

The Tax Commission made no specific finding on the constitutionality of the Compensating Use Tax. It sustained the imposition of this tax on the authority of *Wilder Company v. State,* 48 Wn.(2d) 834, 297 P.(2d) 241, in which the Federal Question was not raised.

On appeal to the Superior Court of the State of Washington for Thurston County the Federal Question was raised in paragraph VII of the Complaint:

> "That said taxes paid and the taxes claimed of Plaintiffs pursuant to Tax Assessment No. 106869, together with all interest claimed thereon should be abated and ordered repaid to Plaintiffs, insofar as paid, for the following reasons:
>
> "1. That said taxes claimed and assessed against Plaintiffs and as paid by Plaintiffs are illegal and void as capricious, arbitrary and discriminatory in character and in violation of Article Fourteenth of the Constitution of the United States and Article 1, § 12, and Article 7, §1, of the Constitution of the State of Washington, in that as interpreted and sought to be applied by the State Tax Commission a different measure and amount of tax is sought to be applied and collected from a Public Road Contractor than is sought to be applied and collected from any other Contractor engaged in identical construction work in the State of Washington. More specifically, a Contractor, other than one doing business as a Public Road Contractor as defined by R.C.W. 82.04.280 is classified as a Wholesaler under R.C.W. 82.04.270, and therefore pursuant to R.C.W. 82.04.440 is exempt from taxation as a Manufacturer under R.C.W. 82.04.-.240, as well as from payment of a Retail Sales Tax upon either the 'value of the products' manufactured or upon the 'gross income of the business.' However, a Public Road Contractor upon exactly the same activity is first sought to be taxed as a Manufacturer under R.C.W. 82.04.240, upon the portion of the construction labeled by the State Tax Commission to be 'manufacturing,' is next

sought to be taxed upon the same 'value of products' as included in the gross income of the business (Contract Price) under R.C.W. 82.04.280 as a Public Road Contractor and is further sought to be taxed under Title IV Compensating (Use) Tax upon the same activity as a "Consumer" based upon the 'value of the article.' There is no reasonable basis for distinction or difference between the activities of a Public Road Contractor and any other Contractor with respect to such activities which the State Tax Commission claims to constitute 'manufacturing' or is there any reasonable basis for the difference or discrimination in measure and amount of tax . . . ."

The Trial Court found it unnecessary to pass upon the Federal Question, for it found Tax Assessments 103587 and 106869 to be erroneous under State law and void and ordered refunded to these Appellants the $100,462.72 they had paid as additional taxes for the year 1958.

When the State of Washington appealed the Trial Court's Decision to the State Supreme Court, these Appellants raised the Federal Question in their "Brief of Respondents" in the following terms:

"B. *Legal Issues Presented by Appeal*

"At pages 11 and 12 of the Brief of Appellant there are stated what Appellant conceives to be 'three questions of law' presented by this Appeal. Respondents submit there are more legal issues presented than admitted by Appellant and state them as follows: . . .

"(4) Were and are the taxes claimed by Appellant under the Tax Assessment Nos. 103587 and

106869 pursuant to the provisions of R.C.W. 82.04.240 and 82.12.020, if applicable, unconstitutional and void as discriminatory? The lower Court did not pass on this issue."

Plaintiffs' argument on the constitutional question commences on page 39 of the "Brief of Respondent" and concludes:

> "It is thus established that there is and can be no distinction, except in name, between a General Contractor and a Public Road Contractor. Yet under the provisions of the statutes in question the mere name results in one paying twice the amount of tax upon the same activities. There is here a clear discrimination without supporting difference and accordingly the Act is unconstitutional as to Respondents, if the construction of the State Tax Commission is upheld."

The Supreme Court of the State of Washington upheld the statutes classifying Public Road Contractor as constitutional in their Decision of April 2, 1964:

> "The respondents urge that R.C.W. 82.04.190 is invalid because it discriminates between public-road contractors and other general contractors. There is a factual difference between these contractors, in that one group contracts with public bodies for a specific class of construction work, while the other does not. The respondents do not deny that the legislation applies alike to all within the class, but contends that no reasonable ground exists for making a distinction between those who fall within the class and those who do not. As we said in *Texas Co. v. Cohn*, 8 Wn.(2d) 360, 112 P. (2d) 522, a state legislature has very broad discretion in making classifications in the exercise of

its taxing powers, and the differences, between the classifications need not be great. If they are substantial, the classification must be sustained."

Appellants again raised the Federal Question in their Petition for Rehearing. Section II of the Petition identified the "Issues Upon Petition for Rehearing" as to include: "The Majority Opinion Incorrectly Holds the Taxes in Question to Be Non-Discriminatory and Constitutional," The 14th Amendment to the United States Constitution was cited on page 17; and Appellants' position was stated as follows:

> "It was and is the contention and position of the Respondents that as interpreted by the State Tax Commission and as presently interpreted by this Court through its majority Opinion R.C.W. 82.04.440, which purports to exempt from double taxation under the Business and Occupation Tax Act certain categories of businesses (not including Public Road Contractors but including General Contractors) and the provisions of the statutes relied upon by the State as sustaining the taxes in question are unconstitutional as discriminatory."

The Petition for Rehearing was denied by Order filed May 26, 1964.

Thus the constitutionality of the State statutes was challenged at every stage of this proceeding; and the statutes have been sustained as constitutional.

THE QUESTIONS ARE SUBSTANTIAL

The Supreme Court of the United States has twice reviewed the Washington State Business and Occupation Retail Sales and Compensating Use Tax Statutes

in cases where the taxes were in fact *uniformly* assessed on all persons engaging in similar activities in interstate and intrastate commerce. *Henneford v. Silas Mason Co.*, 300 U.S. 577; *General Motors Corp. v. Washington*, ... U.S. ..... (decided June 8, 1964, 12 L.ed.(2d) 430).

This appeal presents a more fundamental issue: Is the state constitutionally required to assess these taxes uniformly on all persons engaged in similar activities.

The record in this case is clear and without contradiction that there is no factual basis for distinction between a so labeled "Public Road Contractor" and any other contractor. (See Brief of Respondent, Pages 39-40-41.) This lack of factual distinction was recognized by the Supreme Court of Washington in its opinion since it could only state that "There is a factual difference between these contractors, in that one group contracts with public bodies for a specific class of construction work, while the other does not." It is respectfully submitted this is a distinction without a difference since the difference relied on is not of activity or character of the work but merely of contracting parties.

It would seem unnecessary to argue or present authority that discrimination in taxation presents a substantial question for consideration and action by this court.

The Fourteenth Amendment to the Constitution makes it crystal clear that immunity from discrimination and equal protection of law is a fundamental right guaranteed to each person and that it is the duty of

this court to see that the protection guaranteed by the Constitution is not violated.

That the questions presented are substantial as to the appellants is demonstrated by the fact they have had assessed against them as alleged Public Road Contractors $225,866.75 in "privilege" taxes merely by categorizing them as such while neither they or any other contractor exercising indistinguishable "privileges" in doing business with a public or private entity, other than in the "building, repairing or improving any publicly owned street, place, road, highway, bridge or trestle which is used, or to be used primarily for foot or vehicular traffic" are so taxed.

The issue has broad significance for all persons contracting with State or Federal agencies for no such citizen of the United States will be constitutionally protected from having his "privilege" taxes discriminatorily pyramided if contractors may be separated into general contractors and "public road contractors" and taxed differently upon identical activities.

The issue also has important ramifications in view of the recent decisions of the Supreme Court of the United States establishing the state's right to collect privilege and use taxes from persons engaged in interstate commerce and from persons who are Government contractors. *Esso Standard Oil Co. v. Evans*, 345 U.S. 495; *United States v. Detroit*, 355 U.S. 466; *United States v. Township of Muskegon*, 355 U.S. 484; *City of Detroit v. Murray Corp.*, 355 U.S. 489; *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376; *Halliburton Oil Well Cementing Co. v. Reiley*, 373 U.S. 64; *General*

Motors Corp. v. Washington, ... U.S. ..... (decided June 8, 1964, 12 L.ed.(2d) 430) and *United States v. Boyd*, ... U.S. ..... (decided June 15, 1964, 12 L.ed. (2d) 713). If the Fourteenth Amendment to the United States Constitution does not guarantee each person within a state that he will be taxed uniformly with respect to the privilege of engaging in business within that state, the criterion of uniformity found necessary to support *extensions* of such taxes to persons engaged in interstate commerce and to Government contractors will become meaningless. Uniformity in taxation between taxpayers can be destroyed by the states with impunity, as long as the discrimination applies equally to members of the class engaged in interstate and intrastate commerce.

These appellants submit that the Fourteenth Amendment does require privilege and use taxes be applied without discrimination to all persons engaged in similar activities; and that the Washington Business and Occupation Tax and Compensating Use Tax, as applied to these appellants, is unconstitutional.

1. The classification "Public Road Contractor," as defined in R.C.W. 82.04.280(2) is patently discriminatory. It includes "every person engaging within the state in the business of: ... (2) building, repairing or improving any publicly owned street, place, road, highway, bridge or trestle which is used or is to be used for foot or vehicular traffic"; and excludes all "persons" doing identical work on privately owned roads, bridges, etc. This statute was sustained by the Washington State Supreme Court on the demonstrably false premise that

persons working on public roads are a "separate and distinct group" from all contractors. Appellants demonstrated the fallacy of this assumption at the trial and in the Washington State Supreme Court. Their uncontradicted proof established that the *same* general contractors work on public and private projects; and they use the same methods, hire the same personnel, and use the same equipment on publicly and privately financed construction projects. Thus the business of contracting is not divisible into distinct groups by the identity of the contractee. The result of the arbitrary classification established by R.C.W. 82.04.280(2) has been that these appellants are forced to segregate their total cash receipts on the basis of the identity of the contractee. They pay taxes on a portion of their receipts as general contractors and pay taxes on a portion of their receipts as "public road contractors."

2. To be sustained as constitutional under the Fourteenth Amendment to the United States Constitution, every classification of *persons* must be based upon genuinely different characteristics of the businesses included and excluded from a classification. *Morey v. Daud*, 354 U.S. 457. Taxicab operators cannot be divided and taxed differently on the basis of the identity of the owner as a corporation or an individual, because the identity of the operator does not constitute a genuinely different characteristic of the *businesses* included and excluded. *Quaker City Cab Co. v. Penn.*, 277 U.S. 397. Drug stores selling travelers' checks cannot be segregated (for licensing) into those selling American Express travelers' checks and those selling

similar checks issued by other companies, because no significant difference in the business of selling travelers' checks can be predicated on the type of check sold. *Morey v. Daud, supra.* On the same principle, the identity of the contractee as a public or private person has no meaningful significance in the contracting business.

3. In both the *Quaker City Cab Co.* case (*supra*) and *Morey v. Daud* (supra) the statutory classification did at least segregate persons into different classifications (all cab operators were either incorporated or not; the same drug store was never licensed to sell more than one type of travelers' check). The public road contractors classification merely segregates each contractors income by its source. Classifications of income by source, for tax purposes, have been held constitutional only where "the different treatments [of income] is not so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. City of St. Louis, Mo.* 347 U.S. 231 at page 237. Taxing these appellants on the income they received from a "public body" at an aggregate amount of $225,866.75 more than the $95,383.46 these appellants would have had to pay on a similar transaction with a private contractee is so disparate as to be arbitrary.

4. The "public road contractor" classification is also invidiously discriminatory according to another criterion applied by the United States Supreme Court. Every constitutional classification must be based upon some ground of difference having a fair and substantive

relation to the purpose of the legislation. *Allied Stores of Ohio, Inc. v. Bowers* 358 U.S. 522. The purpose of the Washington State Business and Occupation Tax has been defined. It is to raise revenue by taxing each person *once* for the privilege of engaging in business in this state. *Crown Zellerbach Corp. v. State* (1954) 45 Wn.(2d) 749, 278 P.(2d) 305. Any person who manufactures and sells his product within the State is exempt from the manufacturers tax on those articles he sells in this state. *McDonnell & McDonnell v. State* (1963) 62 Wn.(2d) 553 383 P.(2d) 905. Some persons actually engaged in building public roads for public bodies are exempt from tax as "public road contractors" on meaningless distinctions between the "privilege of building roads" and the "cost of doing business as a wholesaler." *Peshastin Lbr. & Box, Inc. v. State* (1963) 61 Wn.(2d) 413, 378 P.(2d) 420.

5. As long as the Washington Business and Occupation Tax, as construed and applied by the Supreme Court of the State of Washington, allows the Peshastin Lumber & Box Co., Inc. to exercise the "privilege" of building public roads for public bodies without taxing such activity, we submit the Fourteenth Amendment to the United States Constitution prohibits the State from taxing these appellants for engaging in such activity (although these appellants admit they would be taxable on their gross receipts as the Peshastin Lumber & Box Co., Inc. was taxable on its gross receipts). For the same reason, these appellants should be constitutionally exempt from liability for a manufacturers' tax as long as McDonnell & McDonnell are so exempt; and also as

long as R.C.W. 82.04.440 exempts substantially all tax payers from double taxation.

6. These appellants support their claim to immunity from the "public road contractors" tax and the "manufacturers" tax on the repeated holdings of the United States Supreme Court that the Fourteenth Amendment prohibits the State from taxing one person for a "privilege" the State grants another person gratuitously. Thus, the United States Supreme Court has held that public utility companies cannot be taxed for the privelege of filing mortgages for record as long as other individuals may exercise that privilege, gratuitously. *Louisville Gas & Electric Co. v. Coleman* 277 U.S. 32. The state cannot tax individuals for the privilege of lending money in a state at rates of interest of 5% or over as long as other persons can lend money at lower rates of interest, gratuitously. *Colgate v. Harvey* 296 U.S. 404. Fire insurance companies cannot constitutionally be taxed for the privilege of writing casualty insurance within a state as long as straight casualty insurance companies are not taxed. *Concordia Fire Insurance Company v. Illinois* 292 U.S. 535. The states are prohibited from levying graduated gross receipts taxes on the privilege of making sales at retail. *Stewart Dry Goods Company v. Lewis* 294 U.S. 550. These cases conclusively demonstrate that the "uniformity" the United States Supreme Court has consistantly cited as a characteristic of privilege, sale and use taxes is in fact based upon a constitutional guarantee of absolute uniformity of taxation for all persons exercising the same privilege within a state.

7. The invidious discrimination which resulted in the assessment of the Compensating Use Tax against these appellants for the value of all components and materials incorporated in the Hood Canal Bridge was effected in the following manner: R.C.W. 82.12.020 levies upon "every person in this state a tax or excise for the privilege of using within the state *as a consumer* any article of tangible, personal property purchased at retail, or acquired by lease, gift, or bailment, or extracted or produced or manufactured by the person so using the same. . . . " (emphasis added) As written the tax would appear to be non-discriminatory. However, the word "consumer" is defined by R.C.W. 82.04.190 to *exclude* any person ". . . incorporating [tangible personal property] as an ingredient or component in real or personal property when . . . repairing . . . improving, constructing . . . such real property of or for consumers . . . " This exclusion effectively exempts general contractors for liability for a Use Tax with reference to the components or material incorporated in a construction project. Subdivision (3) of R.C.W. 82.04.190 qualifies the exemption available to all contractors by classifying "any person engaged in the business of contracting, building, repairing or improving of any publicly owned street . . . bridge or trestle" as a consumer of the "tangible personal property" used or consumed in such business." The apparent uniformity in the levy of Use Taxes under R.C.W. 82.12.020 is in fact destroyed by the artificial definition of who is a consumer. The Constitutional guarantee of absolute uniformity in the assessment of privilege taxes established by the cases cited in paragraph 6 of this Jurisdictional Statement

preclude the State of Washington from collecting a Use Tax from "public contractors" which other contractors are not required to pay.

In conclusion, the Appellants respectfully submit that the classification of "public road contractors" under R.C.W. 82.04.280 (2) is discriminatory and void for there is no genuine difference in the characteristics in the business of contracting with "public bodies" with respect to roads and bridges and contracting with private persons or public bodies with respect to all other construction projects. In practice, the artificial classification forces general contractors to segregate their gross receipts by the source from which they are received. The segregation of income by source is unconstitutional when it results in disparate treatment of income from related sources.

Appellants have further demonstrated that both the Business and Occupation Tax and the Compensating Use Tax, as construed and applied by the Supreme Court of the State of Washington, are not applied uniformly. The gross receipts and "manufacturer's" taxes are not applied uniformly as long as an arbitrary class of "public road contractors" must pay both while all other manufacturers" pay either one or the other, but not both. (See *McDonnell & McDonnell v. State, supra,* p. 17). The "public road contractor's" tax is not applied uniformly since a "wholesaler," such as the *Peshastin Lumber & Bag Co., Inc.* (*supra,* p.-17) is exempt from a "public road contractor's" tax, while these appellants are taxed for exercising identically the same privilege; nor is the "compensating use tax" uniformly applied

where all persons engaged in improving real property are excluded from the classification of consumers subject to the use tax while "public road contractors" are classed as "consumers" with respect to identical activities. As long as any persons are permitted to exercise the privileges of building roads, manufacturing, and "using" personal property in construction within the State of Washington gratuitously, the public road contractors' tax under R.C.W. 82.04.280 (2) and the Compensating Use Tax under R.C.W. 82.12.020 and 82.04-.190 are unconstitutional and void as applied to these appellants.

It is respectfully submitted that there is involved in this appeal a substantial and important question concerning the proper application of the Fourteenth Amendment to the Constitution of the United States which warrants full consideration by the Court, with briefs on the merits and oral arguments for its resolution. Insofar as we have been able to determine this case presents the first instance where a state court has sustained, against a challenge on Federal grounds, a non-uniform Business and Occupation Tax and Compensating Use Tax. This Court should entertain jurisdiction in this case to prevent the spread of such a practice and to preserve and promulgate the rights guaranteed to appellants by the Fourteenth Amendment.

Respectfully submitted:

STUART G. OLES
SETH W. MORRISON
Attorneys for the Appellant.

GERALD DEGARMO
HARRY R. VENABLES
Of Counsel

APPENDIX "A"

OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON

64 Wash. Dec. 2d 105.

[No. 36747. En Banc. April 2, 1964.]

MORRISON-KNUDSEN COMPANY, INC., *et al.*, *Respondents*, v. THE STATE OF WASHINGTON, *Appellant*.*

ROSELLINI, J.—This action was brought by the respondents as an appeal from two orders of the State Tax Commission, denying a refund of business and occupation taxes and use taxes paid to the appellant and accruing during the period of December 11, 1957, to September 30, 1959. The taxes involved were:

(1) Business and occupation taxes for manufacturing activities. This tax was to be measured by the value of 23 pontoons, 44 anchor shells, and two steel transition spans which the appellant contended were prefabricated or manufactured by the respondents and then incorporated into the Hood Canal Bridge; and

(2) Use taxes, measured by the value of the articles so prefabricated or manufactured by the respondents and subsequently used in completion of the respondents' contract with the Washington Toll Bridge Authority for construction of the Hood Canal Bridge.

The respondents complained that they were not liable for the taxes because they were not engaged in manufacturing activities, they did not "use" the pontoons and anchor shells as "consumers," and the pontoons and anchor shells had no value for excise tax purposes.

The trial court sustained the first two of these three contentions and did not pass upon the third.

Briefly stated, the evidence showed that the respondents who were equipped to construct the floating sec-

tions of the Hood Canal Bridge according to the contract specifications and to assemble and anchor the same at the bridge site, entered into a joint venture for the purpose of undertaking the construction of the bridge. They were awarded the contract and paid a business and occupation tax based on the gross proceeds of the contract under the provisions of RCW 82.04.280.

The prefabricating of the pontoons and anchor shells was done at the respondents' dry dock and graving yard in Seattle, on the Duwamish River. When the basic hulls of the pontoons were completed in dry dock, they were launched and floated to the graving yard. At the graving yard, a variety of operations were conducted to prepare each pontoon for eventual use in the bridge structure. Some required installation of elevated roadbeds. Each required, among other things, installation of electrical conduits and preparation for installation of railings.

The construction of the 44 floating anchor shells was also accomplished in the floating dry dock. Each anchor shell was constructed of concrete reinforced by honeycombs of steel. The steel transition spans the value of which was included in the assessment base, were also assembled in Seattle, although in this case the assembly was accomplished by a subcontractor.

After the anchor shells were completed, they were floated out of dry dock and were towed as a barge to Port Gamble where they were "beached" and flooded for storage. They were stored by the respondents for periods of up to 2 years. The anchor shells were constructed at Seattle in anticipation of further modification at Port Gamble and the bridge site just prior to their incorporation into the bridge structure. Floated into position over a carefully prepared underwater location, each anchor was rigged by cable to the bridge

and while held in position, was filled with concrete, and then guided to its final underwater resting place.

At the Duwamish River location, the respondents proceeded to manufacture the pontoons to the stage of completion required by the design specifications. The pontoons were then floated and towed to a storage yard at Idaho Street in Seattle where they were stored for periods up to 2 years. They were then towed to Port Gamble Bay about 1½ miles from the bridge site, where they were again stored for a period while additional work was done thereon.

After the partial construction at Seattle of pontoons "L" and "M," which were a part of the draw pontoons, they were towed to the yard of the National Steel Company on the Duwamish River in Seattle, where they were used as a floating platform for prefabrication of the steel transition spans. After the spans were assembled on the decks of pontoons "L" and "M," the pontoons served as barges for movement of the spans to the bridge site. After placement of the transition spans, pontoons "L" and "M" were returned to Seattle for completion according to design specifications.

At Port Gamble Bay units of two or three pontoons were joined together by various operations, including bolting, cementing, and grouting. The units were then floated to the bridge site for additional jointing, connections, and placement of cables. When about half of the bridge was in place, severe storms occurred, which disclosed that the bridge as designed was inadequate to stand up to the rigors of tidal and storm action of Hood Canal. Damage had been done to units of the bridge that have been put in place. Accordingly, it became necessary to remove six pontoons which had been placed, for modification and strengthening before reinstalling them in the bridge structure.

The Washington Toll Bridge Authority then issued a call for bids for this work and for the repairing of storm damage. Yuba Erectors was the successful bidder and it eventually completed the final assembly of the bridge. The respondents' contract was terminated by mutual consent.

The Tax Commission assessed business and occupation taxes against the respondents, based upon the activity of manufacturing and using the pontoons and anchor shells, measured by the cost of manufacturing those items at Seattle, away from the bridge site.

The theory of the Tax Commission assessment was that the respondents' Seattle operations were a separate activity taxable just as though the taxpayer had subcontracted the construction of the pontoons and anchor shells to an independent subcontractor.

The trial court held that the shells and pontoons were not "manufactured," within the meaning and intent of RCW 82.04.110, -120, -130, and -240 and were not "used" or "consumed" by the respondents as a public road contractor, within the meaning and intent of RCW 82.04.190.

Error is assigned to these findings and the conclusions of law and judgment based thereon.

A business and occupation tax is levied upon every person who engages in business activities, under RCW 82.04.220. This tax is expressly levied upon manufacturers in RCW 82.04.240, which provides that the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, manufactured, multiplied by the rate of one-quarter of one per cent.

The term "manufacturer" is defined in RCW 82.04-.110 as follows:

> "'Manufacturer' means every person who ... manufactures ... for commercial or industrial use from his own materials or ingredients any articles, substances or commodities. ... "

The term "to manufacture" is defined in RCW 82.04-.120 as embracing

> "... all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful substance or article of tangible personal property is produced for sale or commercial or industrial use, and shall include the production or fabrication of special made or custom made articles."

Although the shells and pontoons were huge articles, they were nevertheless "articles of tangible personal property," when they were manufactured or fabricated at the Seattle dry docks and graving yard; and they were the result of the application of labor and skill to materials to produce new, different, and useful articles.

[1] The trial court seems to have been impressed by the fact that additional work remained to be done upon these articles before their final installation as parts of the bridge. This fact, however, did not make them any the less "new" and "different" or render them useless. They had reached the stage of completion required by the contract when they left the Seattle dry docks and were useful for the purpose for which they were constructed, even though modifications and other additional work were required before their final installation.

The respondents argue that these items were "constructed" rather than "manufactured," and that the term "to manufacture" implies the making of a product salable in ordinary commerce. The statutory definition does not so limit the term. We may concede

that there are construction activities which are not "manufacturing." Road building, for example, is not "manufacturing" because it does not result in the production of an "article of tangible personal property," but rather the improvement of real property. But the constructing of new, different, or useful articles of tangible *personal* property is "manufacturing," as defined by the statute. The respondents do not suggest that the items in question here were real property. The statute does not confine the definition of manufactured articles to those made for commercial use, but includes those intended for industrial use, and expressly applies to the manufacturing of special or custom-made articles.

Nor does the statute limit the taxable activities to those resulting in the production of "finished" products, and we cannot assume that it was the intent of the legislature that only such activities should be taxed, as this would result in the exemption of a very large segment of the manufacturing community, the makers of "parts." Thus, if every part of a clock were manufactured by a different person, only the one who finally assembled the parts would be taxed. We would then be greeted with a storm of protest that the tax was grossly discriminatory.

Under the plain language of the statute, if the activity of the taxpayer results in an article of tangible personal property which is new, different, or useful, it is taxable. The anchor shells, pontoons, and transition spans fell within each of these descriptions.

We conclude that the trial court was in error when it held the manufacturer's tax inapplicable.

The trial court also found that the respondents did not use the items in question, as a consumer, within the meaning and intent of RCW 82.04.190. The section

defines the word "consumer," in pertinent part, as follows:

> "(3) Any person engaged in the business of contracting for the building, repairing or improving of any publicly owned street, place, road, highway, bridge or trestle which is used or to be used primarily for foot or vehicular traffic as defined in RCW 82.04.280, in respect, however, only to tangible personal property used or consumed in such business;"

The compensating or "use" tax is levied in RCW 82.12.020, which provides:

> "There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, or acquired by lease, gift, or bailment, or extracted or produced or manufactured by the person so using the same. . . ."

It will be seen that the respondents, as public-road contractors, were consumers. The only question remaining is whether they "used" the items.

RCW 82.12.010 reads in pertinent part:

> "(2) 'Use,' 'used,' 'using,' or 'put to use' shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state;"

[2] By the definition, to store an article (as a consumer) or to withdraw it from storage is a "use" of it. According to the evidence, the respondents performed these and other acts of dominion over the articles, and actually installed about half of the pontoons and

anchors. According to the statutory definitions, therefore, the taxable incidents had occurred; that is, the respondents had used the articles, as consumers, in the business of constructing a public bridge, and the respondents became liable for the tax, even though the final installation was done by another contractor.

[3] The respondents urge that RCW 82.04.190 is invalid because it discriminates between public-road contractors and other general contractors. There is a factual difference between these contractors, in that one group contracts with public bodies for a specific class of construction work, while the other does not. The respondents do not deny that the legislation applies alike to all within the class, but contends that no reasonable ground exists for making a distinction between those who fall within the class and those who do not. As we said in *Texas Co. v. Cohn*, 8 Wn.(2d) 360, 112 P.(2d) 522, a state legislature has very broad discretion in making classifications in the exercise of its taxing powers, and the differences between the classifications need not be great. If they are substantial, the classification must be sustained.

Of course, the duty is upon the respondents to show that the classification is arbitrary. This they have not done.

The trial court made no finding on the value of the articles in question. The cause is therefore reversed and remanded with instructions to determine whether the respondents have sustained the burden of showing that the valuation arrived at by the tax commissioner was incorrect, in accordance with RCW 82.32.180.

FINLEY, HUNTER, HAMILTON, and HALE, JJ., and MURRAY, J. Pro Tem., concur.

HILL and DONWORTH, JJ., and OTT, C.J. (dissenting)

—We dissent. We agree with the trial court that where contractors partially constructed, according to the state's minute specifications, huge pontoons and anchor shells intended for use in the Hood Canal Bridge, concededly an integral part of the state's highway system, using their own forces and materials, there is no logical or factual reason why such activities should be termed "manufacturing" and taxed as such.

Circumstances demonstrated that these partially constructed pontoons and anchor shells could not be used, as designed. There is nothing to indicate that these "orphans of the storm" constituted a "new, different or useful article of tangible personal property" nor were they a "substance of trade or commerce," within the purview of RCW 82.04.120, and hence not subject to the manufacturer's tax as levied by RCW 82.04.240.

As a "Public Road Contractor" the contractors here could only be liable to a claim for a manufacturing tax, if a "consumer" under RCW 82.04.190(3), "in respect, however, only to tangible personal property used or consumed in such business." and under RCW 82.12.020 they could only be held liable for a compensating or use tax as to the use within the state "as a consumer" of the manufactured product.

In its memorandum opinion, the trial court said:

> "Plaintiffs contracted to construct a bridge known as the Hood Canal Bridge. Plaintiffs never built the bridge for reasons which are too well known to require discussion here. Under the unusual and nearly unique facts of this case the plaintiffs were not 'consumers' as that term is defined in RCW 82.04.190 in that they the plaintiffs did not 'use' or 'consume' the pontoons and anchors. While it may well be that the pontoons and anchors were eventually 'used or consumed' in the building of the bridge, it was not by these plaintiffs. . . ."

His logic seems, to us, inescapable.

The trial court correctly determined that the respondents were not engaged in "manufacturing" and that they were not "consumers" of the partially constructed pontoons and anchor shells. We would affirm the trial court.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MORRISON-KNUDSEN COMPANY, INC., THE HENRY J. KAISER COMPANY, PUGET SOUND BRIDGE & DRYDOCK COMPANY, doing business as MORRISON-KAISER-PUGET SOUND-GENERAL, *Respondents,* vs. THE STATE OF WASHINGTON, a sovereign state, *Appellant.*	No. 36747

REMITTITUR

Thurston County No. 32474

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 2, 1964, became the final judgment of this court in the above entitled case on May 26, 1964. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Seven Hundred Eighty One and 13/100 ($781.13) Dollars in favor of appellant and against respondents.

The Petition for Rehearing was Denied by an Order filed May 26, 1964.

cc: Court Reporter

Hon. John J. O'Connell
Mr. John W. Riley
Mr. Henry W. Wager

Allen, DeGarmo & Leedy
Mr. Gerald DeGarmo

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 26th day of May, A.D. 1964.

WILLIAM M. LOWRY,
Clerk of the Supreme Court,
State of Washington.

[SEAL]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

MORRISON-KNUDSEN COMPANY, INC., et al. *Plaintiffs,* vs. THE STATE OF WASHINGTON, *Defendant.*	No. 32474

MEMORANDUM OPINION

Plaintiffs contracted to construct a bridge known as the Hood Canal Bridge. Plaintiffs never built the bridge for reasons which are too well known to require discussion here. Under the unusual and nearly unique facts of this case the plaintiffs were not "consumers" as that term is defined in R.C.W. 82.04.190 in that they the plaintiffs did not "use" or "Consume" the pontoons

and anchors. While it may well be that the pontoons and anchors were eventually "used or consumed" in the building of the bridge, it was not by these plaintiffs. The plaintiffs may present judgment accordingly.

Dated this the 6th day of November, 1961 A.D.

CHARLES T. WRIGHT, *Judge*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

MORRISON-KNUDSEN COMPANY, INC., THE HENRY J. KAISER COMPANY, PUGET SOUND BRIDGE & DRYDOCK COMPANY and GENERAL CONSTRUCTION COMPANY, doing business as MORRISON-KAISER-PUGET SOUND-GENERAL, *Plaintiffs,*	No. 32474
VS.	
THE STATE OF WASHINGTON, a Sovereign State, *Defendant.*	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE having come on regularly for trial before the undersigned Judge of the above entitled Court, on the 20th day of September, 1961, upon the Complaint and Notice of Appeal from Assessment Collection and Payment of Taxes of MORRISON-KNUDSEN COMPANY, INC., THE HENRY J. KAISER COMPANY, PUGET SOUND BRIDGE & DRYDOCK COMPANY and GENERAL CONSTRUCTION COMPANY, doing business as MORRISON-KAISER-PUGET SOUND-GENERAL, as Plaintiffs, pursuant to the provisions of Section 82.32.180 of the Revised Code of Washington and the Answer of THE

STATE OF WASHINGTON, as Defendant, and the Plaintiffs having appeared by their attorney GERALD DEGARMO of ALLEN, DEGARMO & LEEDY and the Defendant, THE STATE OF WASHINGTON, having appeared by JOHN W. RILEY Deputy Attorney General, and HENRY WAGER, Assistant Attorney General, and witnesses having been sworn and evidence introduced, the Court having taken the cause under advisement at the conclusion of trial on September 21, 1961, and having, under date of November 6, 1961, handed down its written Memorandum Opinion and being fully advised in the premises now makes the following:

FINDINGS OF FACT

I.

That MORRISON-KNUDSEN COMPANY, INC. at all times material hereto was and it now is a Delaware corporation and qualified as a foreign corporation to do business within the State of Washington, having paid all license fees for such purpose. That THE HENRY J. KAISER COMPANY at all times material hereto was and it now is a Nevada corporation and qualified as a foreign corporation to do business in the State of Washington, having paid all license fees for such purpose. That PUGET SOUND BRIDGE & DRYDOCK COMPANY, formerly PUGET SOUND BRIDGE & DREDGING COMPANY until change of name, at all times material hereto was and it now is a Nevada corporation and qualified as a foreign corporation to do business within the State of Washington, having paid all license fees for such purpose. That GENERAL CONSTRUCTION COMPANY at all times material hereto was and it now is a Washington corporation and that it has paid all license fees to the State of Washington. That during the period material

hereto said corporations as named in this paragraph were and now are Joint Venturers under the name MORRISON-KAISER-PUGET SOUND-GENERAL, having and maintaining an office and place of business at 5500 West Marginal Way, Seattle 66, Washington, and duly registered with the Washington State Tax Commission under Registration No. C578-32091.

II.

That heretofore and on or about December 23, 1957, Plaintiffs entered into a written Contract No. 5710 pursuant to open and public bidding with the State of Washington, acting through the Washington State Highway Commission and the Director of Highways, for the construction of Hood Canal Bridge, Unit 1. A copy of said Contract, together with the Special Specification Provisions, was introduced in evidence herein as Plaintiffs' Exhibit 1 and a copy of the Standard Specifications of the State Highway Department for Road and Bridge Construction was introduced in evidence herein as Plaintiffs' Exhibit 2.

III.

As a part of the construction of Hood Canal Bridge, Unit 1, under said Contract No. 5710 and Specifications and before commencing the placing, assembly and joining thereof and making the same a part of the finished bridge structure Plaintiffs were required to partially construct 23 pontoons or floating segments of the bridge, 44 anchor shells and the steel transition or transfer spans away from the bridge site and thereafter float said portions of the bridge into final position (there being no access provided under the Contract from the shore to either end of the Hood Canal Bridge, Unit 1). Each of said partially constructed sections or segments was an essential part of the Hood Canal Bridge, Unit 1,

without which there would not and could not be a complete or usable bridge. For the purpose of constructing said pontoons and anchor shells to the stage where it was possible to float the same to the bridge site the Plaintiffs, as Joint Venturers, leased from General Construction Company, one of the Plaintiffs, a graving dock in Seattle, Washington and then expended substantial sums of money in enlarging said graving dock and building a mooring or outfitting dock and other facilities alongside where such construction could take place. Plaintiffs then proceeded to construct in said graving dock to a stage of partial completion the pontoons and anchor shells. The partially completed pontoons were then launched and moved to the mooring or outfitting dock where further construction work was performed, after which they were towed to a storage area or site near Idaho Street on Duwamish Waterway in Seattle and from there to a storage site at Port Gamble Bay about one and one-half miles from the bridge site. The partially completed anchor shells, after removal from the graving dock in Seattle, were towed by tug six at a time to a place on a sandy beach in Port Gamble Bay approximately one mile from the bridge site where they were filled with water and sunk for storage. After the construction of Pontoons "L" and "M", being a part of the draw pontoons, had been partially completed false work was constructed thereon, they were towed to the yard of National Steel Company on Duwamish Waterway in Seattle and there was partially constructed on such false work the steel transfer or transition spans by a Subcontractor of Plaintiffs from steel furnished by Plaintiffs and such spans were then transported one at a time upon said partially competed Pontoons "L" and "M" from Duwamish Waterway in Seattle to the bridge site, where they were floated into place by tidal action and ballasting. Said steel transition spans were of special design, usable only to form

a part of a completed bridge structure of Hood Canal Bridge, Unit 1, and as such had no "value" apart from incorporation into said completed bridge structure.

IV.

Following the arrival at Port Gamble Bay storage yard of certain of the partially completed pontoons, they were connected together during the summer and fall of 1959 in units of two or three by rubber seals, grouting and bolting and were then towed to the bridge site where the units were, in turn, fastened together in the same manner. During the same period the partially constructed anchor shells were added to at the storage site in Port Gamble Bay by the attachment of the yoke and anchor cable, then dewatered and towed into place, where they were attached to a hoist, filled with poured concrete and lowered to the bottom and the anchor cable was attached to a buoy or to one of the pontoons then in place. Before the work of placing and connecting said pontoons and anchors could be completed there occurred storms in December of 1959 and January and February of 1960, which caused substantial damage to certain of the partially completed pontoons and conclusively demonstrated that the design of the bridge structure was inadequate and that no usable bridge could be constructed with the pontoons, anchor shells and steel transition spans as constructed by Plaintiffs. By reason thereof Plaintiffs were ordered by Defendant to disconnect six (Pontoons "C", "D", "E", "F", "G" and "H") of the previously connected and anchored pontoons and tow the same to Port Gamble storage area, the Contract of Plaintiffs No. 5710 with the Defendant was terminated by mutual agreement and bids were called by Defendant for the strengthening, modification and placement of all of the pontoons for the bridge structure, the placing of riprap around the anchors to

cause them to stay in place and other items of work as shown by the Specifications introduced in evidence herein as Plaintiffs' Exhibit 4, and pursuant to which call for bids and bids submitted thereunder a Contract was let by Defendant to Yuba Erectors Division of Yuba Consolidated Industries, Inc. for the sum of $3,445,000.00.

V.

That none of the pontoon sections, anchor shells, or steel transition spans as partially constructed by Plaintiffs, were then capable of use as a part of the Hood Canal Bridge, Unit 1, or for any other known purpose at the time the same left the graving dock of Plaintiffs in Seattle, at the time the same left the outfitting dock of Plaintiffs in Seattle, at the time the same left the Idaho Street storage yard of Plaintiffs in Seattle, at the time the same reached or left the Port Gamble Storage and assembly area, but each at all times required further and additional construction work to make the same usable as a part of the completed bridge structure, which work was never performed by Plaintiffs.

VI.

That Plaintiffs as public road contractors under RCW 82.04.280 did not use or consume in their business the partially completed pontoon sections, anchor shells or transition spans upon which the tax in issue was collected and sought to be collected.

VII.

That the Defendant, through its State Tax Commission, prior to the institution by Plaintiffs of this Appeal therefrom, levied an assessment of tax against Plaintiffs in the sum of $232,928.94 for the period De-

cember 11, 1957 to September 30, 1959, pursuant to Field Audit Report dated May 5, 1960, (Plaintiffs' Exhibit 7) which amount was reduced by $1,034.43 by Supplemental Field Audit Report dated June 8, 1960, leaving an amount claimed of $231,894.51, of which amount $100,462.72 was claimed for the year 1958, all by reason of the contention by the Defendant, through its State Tax Commission, that Plaintiffs were subject to tax as "manufacturers" under RCW 82.04.240 and the provisions of RCW 82.04.110, 82.04.120, 82.04-.130 and 82.04.190 of the partially completed pontoons, anchor shells and transition spans based upon the "value of the products" and were liable to a Compensating (Use) Tax under the provisions of RCW 82.12-.010, 82.12.020 and 82.04.190 upon the same partially constructed pontoons, anchor shells and transition spans based upon the "value of the article."

VIII.

In arriving at the "value of the product" for the purpose of the Manufacturers Tax and at the "value of the article" for the purpose of the Compensating (Use) Tax, the Defendant, through its State Tax Commission, did not attempt to or did it fix or determine a separate valuation upon each separate pontoon, anchor shell or transition span, but rather copied from Plaintiffs' cost accounting records, Plaintiffs' Exhibits 8, 9 and 10 herein, the "actual cost" or "revenue to date" figures of performing various bid items under Contract No. 5710, which were, in part, based upon estimates and incomplete quantity determinations and in the instances stated included quantities of the bid item which were actually used at the bridge site rather than in Seattle or at the Port Gamble storage area. There were included in the figures used by the State Tax Commission as the basis for its assessment of tax the following quan-

tities and amounts of bid items actually used at the bridge site:

Bid Item	*Audit Item*	*Description*	*Amount*
15	7015	Steel Reinforcing Bars 210,082 pounds	$28,865.26
28	7028	Cast Steel, Pontoon Cable Anchorages 69,275 pounds	35,330.25
29	7029	Structural Carbon Steel, Pontoon Cable Anchorage 216,920 pounds	52,060.80
41	7041	Timber Lumber, Creosote Treated—37.32 MFBM	19,935.60

As to Bid Items 17 and 18, Audit Items 7017 and 7018 covering the transition spans, the State Tax Commission adopted the amount paid on estimate on account of the Subcontract price for work performed to Septemper 30, 1959, in the sum of $461,005.42, which Subcontract included all work of placing at the bridge site or otherwise and towing to the job site, whereas there was eliminated by the State Tax Commission for the determination of tax liability only the towing cost. The State Tax Commission further included in its figures for the determination of tax liability an amount which had been prorated among the Contract bid items as overhead resulting from the cost of the sinking and raising of Pontoons "B" and "T" and which amount was later eliminated from overhead. There was also included in its figures for the determination of tax liability by the State Tax Commission the prorata portion allocated by Plaintiffs to Contract bid items of the cost

of enlarging the drydock, building the graving dock and plant setup at the Duwamish Waterway yard of General Construction Company in the sum of $1,285,254.20 and credit was allowed for Compensating (Use) Tax purposes of only the Sales and Use Taxes paid at source on permanent materials and supplies, but nothing for Sales Tax paid upon the plant itself.

IX.

That no "Manufacturing" or "Compensating (Use) Tax" was collected or claimed by the State Tax Commission upon work similar in character to that involved in this action in the case of the construction by General Construction Company, one of the members of the Joint Venture of Plaintiffs, of the First Avenue South Bridge in Seattle, Washington, which work started in March of 1954 and was completed and accepted December 16, 1955, in connection with which a U shaped structure for the piers of said bridge was constructed in the graving dock of General Construction Company (being the same dock used by Plaintiffs after enlargement and alteration) and then launched and floated approximately one mile to the site of the bridge, where it was sunk to form the piers for the bridge.

XI.

That following the assessment of said taxes in the amount of $231,894.51 of which amount $31,633.37 was business and occupation tax for the period from December 11, 1957, to September 30, 1959, the Plaintiffs protested the whole of said assessment and on July 18, 1960, paid under protest to the State Treasurer of Washington, through the State Tax Commission, the sum of $100,462.72 of which $15,025.19 was business and occupation tax as the tax claimed for the year 1958, and then pursuant to the provisions of RCW 82.32.180 ap-

pealed to this Court from the whole of said assessment and claimed a refund of the amount paid with interest and for general relief.

From the foregoing Findings of Fact the Court deduces the following:

CONCLUSIONS OF LAW

I.

That Plaintiffs did not "use" and were not the "consumers" of the partially completed pontoons, anchor shells and transition spans within the meaning and intent of RCW 82.04.190 and all taxes claimed by Defendant from Plaintiffs under Tax Assessments Nos. 103587 and 106869 were and are erroneously assessed and should be cancelled and the amount paid by Plaintiffs thereon of $100,462.72 on July 18, 1960, should be ordered refunded to Plaintiffs, together with interest at 3% per annum from July 18, 1960, until paid.

II.

That Plaintiffs were not "manufacturers" within the meaning and intent of RCW 82.04.110, RCW 82.04.120, RCW 82.04.130 and RCW 82.04.240 of the Business and Occupation Tax Act of the State of Washington of the partially constructed pontoons, anchor shells and transition spans and were therefore not subject to a Business and Occupation Tax under RCW 82.04.240, or to a Compensating (Use) Tax under RCW 82.12.020, by reason of which all taxes claimed by Defendant from Plaintiffs under Tax Assessments Nos. 103587 and 106869 were and are erroneously assessed and should be cancelled and the amount paid by Plaintiffs thereon of $100,462.72 on July 18, 1960, should be ordered refunded to Plaintiffs, together with interest at 3% per annum from July 18, 1960, until paid.

V.

That a Judgment and Order should be entered herein sustaining the Appeal of Plaintiffs-Appellants, declaring void Tax Assessments Nos. 103587 and 106869 and all taxes assessed and claimed thereby and directing that there be refunded and paid to Plaintiffs by the Defendant, The State of Washington, the sum of $100,462.72, together with interest thereon at 3% per annum from July 18, 1960, until paid, and further directing that Plaintiffs have and recover Judgment against the Defendant for their costs and disbursements herein to be taxed as provided by law.

DONE IN OPEN COURT this 5th day of July, 1962.

CHARLES T. WRIGHT, *Judge*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

MORRISON-KNUDSEN COMPANY, INC., THE HENRY J. KAISER COMPANY, PUGET SOUND BRIDGE & DRYDOCK COMPANY and GENERAL CONSTRUCTION COMPANY, doing business as MORRISON-KAISER-PUGET SOUND-GENERAL, *Plaintiffs*, vs. THE STATE OF WASHINGTON, a Sovereign State, *Defendant*.	No. 32474

JUDGMENT

THIS CAUSE having come on regularly for trial before the undersigned Judge of the above entitled Court on the 20th day of September, 1961, upon the

Complaint and Notice of Appeal from Assessment, Collection and Payment of Taxes of MORRISON-KNUDSEN COMPANY, INC., THE HENRY J. KAISER COMPANY, PUGET SOUND BRIDGE & DRYDOCK COMPANY and GENERAL CONSTRUCTION COMPANY, doing business as MORRISON-KAISER-PUGET SOUND-GENERAL, as Plaintiffs, pursuant to the provisions of Section 82.32.180 of the Revised Code of Washington and the Answer of THE STATE OF WASHINGTON, as Defendant, and the Plaintiffs having appeared by their attorney, GERALD DEGARMO of ALLEN, DEGARMO & LEEDY, and the Defendant, THE STATE OF WASHINGTON, having appeared by JOHN W. RILEY, Deputy Attorney General, and HENRY WAGER, Assistant Attorney General, and witnesses having been sworn and evidence introduced, the Court having taken the cause under advisement at the conclusion of trial on September 21, 1961, and having, under date of November 6, 1961, handed down its written Memorandum Opinion herein, and having heretofore made and entered Findings of Fact and Conclusions of Law, and being fully advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Appeal of Plaintiffs from the Assessment, Collection and Payment of Taxes herein is hereby sustained; that Tax Assessments Nos. 103587 and 106869 are hereby declared to be erroneous, void and set aside and Judgment is hereby granted Plaintiffs, MORRISON-KNUDSEN COMPANY, INC., THE HENRY J. KAISER COMPANY, PUGET SOUND BRIDGE & DRYDOCK COMPANY and GENERAL CONSTRUCTION COMPANY, doing business as MORRISON-KAISER-PUGET SOUND-GENERAL, against THE STATE OF WASHINGTON, Defend-

ant, for the sum of $100,462.72 heretofore paid by Plaintiffs to Defendant on July 18, 1960, on account of the taxes assessed pursuant to said Tax Assessments Nos. 103587 and 106869 heretofore and hereby declared erroneous, void and set aside and that Plaintiffs further recover Judgment against Defendant for interest at the rate of 3% per annum from July 18, 1960, upon said sum of $100,462.72, until paid, and together with Plaintiffs' costs and disbursements herein to be taxed as provided by law.

DONE IN OPEN COURT this 5th day of July, 1962.

CHARLES T. WRIGHT, *Judge*

STATE OF WASHINGTON
TAX COMMISSION
OLYMPIA

BEFORE THE TAX COMMISSION OF THE STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of MORRISON-KAISER-PUGET SOUND-GENERAL 5500 W. Marginal Way Seattle 6, Washington	59-15

ORDER

Registration No. C578-32091

TAX COMMISSIONERS PRESENT: Charles W. Hodde, Commissioner; Clark Squire, Commissioner.

TAXPAYER REPRESENTED BY: Gerald DeGarmo, Attorney and Spokesman; also in attendance as interested parties were the following: Mr. McEkren, R. B.

Snow, Ralph Smith, Mr. Neilsen, Harold Wittner, Mr. Greenway, Russell Mattson, Mr. Moyer and Mr. Standberg.

TAX COMMISSION REPRESENTED BY: Wm. E. Schneider, Secretary; James R. Stanford, Chief of Tax Interpretation; S. E. Tveden, Supervising Examiner; John W. Riley, Counsel.

DATE AND PLACE OF HEARING: October 21, 1958, Olympia, Washington.

FACTS:

This matter came before the Tax Commission as an appeal from rulings given the taxpayer by staff members concerning its Excise Tax liability arising from the construction of floating bridge sections in Seattle for subsequent installation in the Hood Canal bridge under contract number 5710 with the Washington State Highway Commission. As we understand the facts, the structure to be built under the contract consists of concrete floating sections anchored between two permanent concrete piers with sunken anchors and lateral cable supports on the floating pontoons. The floating sections will be constructed in a drydock in Seattle, after which they will be towed to the site and anchored into place as a part of the bridge construction. These sections will not be fully completed in Seattle but will require some additional work at the bridge site to form an integral portion of the bridge structure.

TAXPAYER'S EXCEPTIONS:

The taxpayer pointed out that the full contract price will be subject to the Business and Occupation Tax under the classification "Public Road Construction," as imposed by RCW 82.04.280(2), and voiced disagreement with the staff's ruling that an additional Business and Occupation Tax under the classification "Manufacturing" is due upon the activity of constructing the

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floating sections in Seattle. It was argued generally that this is not the intent of the law and five Washington State Supreme Court decisions dealing with the application of this state's Manufacturing Tax were cited by the taxpayer.

DISCUSSION:

It is clear, under the law, that persons engaged in business as public road contractors and who engage in activities coming within the purview of the provisions of two or more of sections 82.04.230 to 82.04.290, inclusive, are taxable under each paragraph applicable to the activities engaged in. (See RCW 82.04.440.) This is true whether these activities are performed on the public road job site or not. However, in the past where a public road contractor manufactured articles for use on a job site we have not attempted to assert the Manufacturing Tax because of the obvious difficulty in distinguishing such fabricating from that which takes place as an integral part of the road job itself. We have consistently ruled, and this Order constitutes affirmation of our position, that where manufacturing activities are performed by a public road contractor on materials at a location away from the job site (thus eliminating the practical problem of a segregation), the Manufacturing Tax is due on such activities. This brings us to a consideration of whether the fabrication of these floating pontoons in Seattle constitutes, in itself, a manufacturing activity. The controlling statute is RCW 82.04.120 which defines the term "to manufacture" to embrace . . .

> " * * * all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful article of tangible personal property or substance of trade or commerce

is produced and shall include the production or fabrication of special made or custom made articles."

In our view, the fabrication of the floating pontoons falls squarely within this statute inasmuch as the activity resulted in a "new, different or useful article of tangible personal property" and/or also resulted in the "production or fabrication of special made or custom made articles."

At this point it would be well to establish for the record that we are also concerned here with Compensating Tax which is due on manufactured articles for the privilege of using the same, as a consumer, in this state. In the case at hand the measure of the Compensating Tax would be the manufactured value, i.e., the value of the completed bridge component rather than merely the value of materials used. Of the five court cases cited, we feel that only *C. V. Wilder Company, et al., v. The State of Washington*, 48 Wn.(2d) 834, is applicable to the issues before us. The taxpayer argued that this case cannot be used as a precedent because the court considered only the imposition of Compensating Tax and not the Manufacturing Tax. While it is true that the court in the *Wilder* case had occasion to consider only a question concerning Compensating Tax, we nonetheless do not agree with the taxpayer's contention. The fact patterns of the two cases closely parallel each other and in our view the rationale of the *Wilder* decision is directly on point. In that case, briefly, *Wilder* was a public road contractor who, through a subcontractor, manufactured, at some distance from the job site, precast re-enforced concrete roof beams for snow sheds. The issue before the court was whether the Compensating Tax was applicable to the full value of the manufactured beams including materials and labor. The court ruled that the tax was due on the full manufac-

tured value and pointed out that the Compensating (Use) Tax is imposed by RCW 82.12.020.

> "* * * for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, * * * or produced *or manufactured by the person so using the same* * * *" (Emphasis is the court's)

The court went on to point out that *Wilder* was a manufacturer under RCW 82.04.110 and 82.04.120 producing "a new, different or useful article of tangible personal property" irrespective of the fact that the beams had no utility except for use in the snow sheds.

Thus, we feel it is manifestly clear, from our analysis of the law and also the *Wilder* case, that the taxpayer is liable to account for both the Manufacturing and Compensating Taxes on the value of all manufactured articles produced at a location away from a public road job site.

DISPOSITION:

The taxpayer is instructed to report, in addition to the Business and Occupation Tax under the classification "Public Road Construction," both the Manufacturing and Compensating Taxes on the full manufactured value, which includes materials and the labor of preparation, of the floating pontoons constructed in Seattle. All other similar manufacturing activities must also be reported in the same fashion.

DATED this 23rd day of April, 1959.

TAX COMMISSION OF THE STATE OF WASHINGTON

WILLIAM S. SCHUMACHER,
Chairman

CLARK SQUIRE,
Commissioner

STATE OF WASHINGTON
TAX COMMISSION
OLYMPIA

BEFORE THE TAX COMMISSION OF THE STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of MORRISON-KAISER-PUGET SOUND-GENERAL (a joint venture) 5500 W. Marginal Way Seattle 6, Washington	60-64

ORDER

Registration No. C578-32091

TAX COMMISSIONERS PRESENT: William S. Schumacher, Chairman; A. E. Hankins, Commissioner.

TAXPAYER REPRESENTED BY: Gerald DeGarmo, Attorney; Seth Morrison, Attorney; Bob Fullmer, R. A. Snow, Tom Moyer and Ralph Smith.

TAX COMMISSION REPRESENTED BY: James R. Stanford, Secretary; S. E. Tveden, Chief, Review Board Section.

DATE AND PLACE OF HEARING: April 20, 1960, Olympia, Washington.

FACTS:

This hearing involved the same general questions as were presented at the hearing before the Commission held October 21, 1958 and covered by our order 59-15 dated April 23, 1959. However, at the time of the previous hearing, none of the tax in question had been paid by, or assessed against, the taxpayer. An audit has now been performed covering the period December 11, 1957, through September 30, 1959, and Assessment No.

103587 was issued February 11, 1960, for a deficiency found to be due of $249,568.94, this being tax of $242,896.75 and interest of $9,568.94.

The taxpayer is engaged in performing under contract the fabrication and construction of the center, or floating, section of the Hood Canal Bridge, and the contract is estimated to be 9/16 completed as of the cutoff date of the audit.

TAXPAYER'S EXCEPTIONS:

Our prior Order held that the taxpayer was a manufacturer with respect to the pontoon sections manufactured or fabricated at Seattle and brought down to the bridge site for incorporation into the bridge structure. We held that the taxpayer should be held subject to "Manufacturing" Business Tax and Compensating (Use) Tax upon the value of the pontoons so manufactured.

The taxpayer asserts that it is not engaging in business as a manufacturer as well as public road construction and it is contended that all of the work done including the fabrication of pontoons away from the bridge site, as well as all other work done irrespective of location thereof, is simply a part of its public road construction contract. The taxpayer feels that it is discriminatory to find it subject to tax both as a manufacturer and as a public road contractor as to any of the work done pursuant to its contract.

As to the Compensating Tax assessed upon the value of articles manufactured by the taxpayer for its use as a public road contractor, the taxpayer argues that the articles have no value whatever (and therefore there is no "measure" for the tax) until the parts are incorporated into the structure and are accepted by the state, and thus it is urged that this manufacturing is not separable from construction.

Taxpayer also raises the factual objection that, as the audit is presently constituted, the values upon which tax is assessed do not represent the cost of pontoon fabrication, but rather are simply the total of certain contract bid items. Thus, the audit figures include many elements of non-fabrication source, such as towing of the pontoons, repair thereof, placing into the structure, etc.

Finally, the taxpayer requested to be advised where the Tax Commission would draw the line when the pontoons are initially fabricated at one location, are towed to another for certain additional work, moved to another location for certain additional construction, repairs, renovation, and finally moved to the site of the bridge for installation.

DISCUSSION:

It was agreed at the time of the hearing that the audit would be referred to the Audit Division for elimination of any non-manufacturing elements presently included in the value of articles manufactured. The Audit Division has undertaken this work. The taxpayer will not be deemed to be a manufacturer with respect to repair costs or towing charges, since in our view these constitute charges subsequent to completion of the manufacture of the articles involved.

However, we are satisfied that the pontoons made by the taxpayer at its Seattle location are manufactured articles and that these articles do have a value, as such, under RCW 82.04.450. Whether such manufactured articles meet the specifications and warranties of the contract is, in our opinion, an entirely different matter and one which we cannot consider in determining whether or not the taxpayer is liable for tax as a manufacturer. It is entirely conceivable that a pontoon or other manufactured part of the bridge could be found

to be defective, and the taxpayer liable therefor, even though such defect were not discovered until a considerable time after installation of the same in the bridge.

Secondly, RCW 82.04.440 of the law specifies that

> "Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in * * *."

We find that the taxpayer has engaged in activities taxable under the "Manufacturing" classification of RCW 82.04.240 and the taxpayer's contract also involves activities which make it taxable as a public road contractor under RCW 82.04.280. Its activities being within the purview of these two sections, it is proper and necessary that the Tax Commission impose the tax due under both classifications. Such pyramiding of the Business and Occupation Tax is not unconstitutional. *Drury the Tailor v. Jenner,* 12 Wn.(2d) 508. The holding of our Supreme Court in *Wilder Company v. State,* 48 Wn. (2d) 834, makes it clear that Use Tax is due upon the full value of the manufactured articles, including the labor of fabrication. In the *Wilder* case the court specifically struck down as immaterial the contention that a different rule should apply as to specially made or custom made articles used by public road contractors.

We affirm the conclusions expressed in our Order to this taxpayer dated April 23, 1959.

> " 'Consumer' means * * *
>
> " * * *
>
> "(3) Any person engaged in the business of contracting for the building, repairing or improving of any publicly owned street, pace, road, highway, bridge or trestle which is used or to be used pri-

marily for foot or vehicular traffic as defined in RCW 82.04.280, in respect, however, only to tangible personal property used or consumed in such business;" (RCW 82.04.190).

The taxpayer is, therefore, the user or consumer of any articles of tangible personal property used in this contract.

In the *Wilder* case the court ruled that the prefabricated snowshed beams were "new, different or useful" articles of tangible personal property within the definition of "to manufacture" in RCW 82.04.120, and certainly the prefabricated pontoons here involved are likewise articles manufactured by the taxpayer for use in connection with the public road construction contract.

Having engaged in activities which constitute manufacturing, the taxpayer is subject to the business tax imposed upon persons engaged in such an activity (RCW 82.04.240) even though in performing the contract the taxpayer engages in activities which are within the purview of the provisions of another business tax classification as well.

Under RCW 82.12.020 the taxpayer is subject to Use Tax "for the privilege of using within this state as a consumer any article of tangible personal property * * * manufactured by the person so using the same." This tax is due in an amount equal to 4% of the "value of the article used." As in the *Wilder* case such value must include the labor of prefabrication as well as the cost of materials going into such articles.

DISPOSITION:

The taxpayer's petition is denied, except that the Audit Division will amend the audit to exclude from the value of the pontoons any costs of towing, repair, or the

like, which arose after the fabrication or manufacture of the pontoons. Upon completion of this work the Audit Division will advise the taxpayer of the adjusted amount due under the assessment, which amount will be due and payable within twenty (20) days after such notice.

DATED this 20th day of June, 1960.

TAX COMMISSION OF THE
STATE OF WASHINGTON

WILLIAM S. SCHUMACHER,
Chairman

CLARK SQUIRE,
Commissioner

A. E. HANKINS,
Commissioner

APPENDIX "B"

STATUTES INVOLVED

(1) With Respect to Business and Occupation Taxes

DEFINITIONS

"Manufacturer" Defined

RCW 82.04.110 "Manufacturer" means every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or for commercial or industrial use from his own materials or ingredients any articles, substances or commodities. When the owner of equipment or facilities furnishes, or sells to the customer prior to manufacture, all or a portion of the materials that become a part or whole of the manufactured article, the tax commission shall prescribe equitable rules for determining tax liability.

"To Manufacture" Defined

RCW 82.04.120 "To manufacture" embraces all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful substance or article of tangible personal property is produced for sale or commercial or industrial use, and shall include the production or fabrication of special made or custom made articles.

"Commercial or Industrial Use" Defined

RCW 82.04.130 "Commercial or industrial use" means the following uses of products, including by-products, by the extractor or manufacturer thereof:

(1) Any use as a consumer; and

(2) The manufacturing of articles, substances or commodities from extracted products, including by-products.

"Consumer" Defined

RCW 82.04.190 "Consumer" means the following:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property other than for the purpose (a) of resale as tangible personal property in the regular course of business or (b) of incorporating such property as an ingredient or component of real or personal property when installing, repairing, cleaning, altering, imprinting, improving, constructing, or decorating such real or personal property of or for consumers or (c) of consuming such property in producing for sale a new article of tangible personal property or a new substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale;

(2) Any person engaged in any business activity taxable under RCW 82.04.290;

(3) Any person engaged in the business of contracting for the building, repairing or improving of any publicly owned street, place, road, highway, bridge or trestle which is used or to be used primarily for foot or vehicular traffic as defined in RCW 82.04.280, in respect, however, only to tangible personal property used or consumed in such business;

(4) Any person who is an owner, lessee or has the right of possession to or an easement in real or personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a

person engaged in business, excluding only the United States, the state, and its political subdivisions in respect to labor and services rendered to their real property which is used or held for public road purposes.

RATE AND MEASURE OF TAX

Imposition of Tax

RCW 82.04.220 There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

Manufacturers

RCW 82.04.240 Upon every person except persons taxable under subsections (2) or (3) of RCW 82.04.260 engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multipled by the rate of one-quarter of one per cent.

The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

Retailers

RCW 82.04.250 Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one per cent.

Wholesalers—Wholesale Functions

RCW 82.04.270 (1) Upon every person except persons taxable under subsection (1) of RCW 82.04.260 engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent.

(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: *Provided,* That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying one-quarter of one per cent the value of the article so distributed as of the time of such distribution: *Provided,* That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The tax commission shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other tax-

payers: *Provided further,* That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets.

Printers and Publishers—Public Road Contractors—Extractors and Processors for Hire—Cold Storage Warehousemen—Lessors

RCW 82.04.280 Upon every person engaging within this state in the business of: (1) Printing, and of publishing newspapers, periodicals or magazines; (2) building, repairing or improving any publicly owned street, place, road, highway, bridge or trestle which is used, or to be used, primarily for foot or vehicular traffic including any readjustment, reconstruction or relocation of the facilities of any public, private or cooperatively owned utility or railroad in the course of such building, repairing or improving, the cost of which readjustment, reconstruction, or relocation, is the responsibility of the public authority whose street, place, road, highway, bridge or trestle is being built, repaired or improved; (3) extracting for hire or processing for hire; (4) operating a cold storage warehouse, but not including the rental of cold storage lockers; (5) the renting or leasing of real property; as to such persons, the amount of tax on such business shall be equal to the gross income of the business mutiplied by the rate of one-quarter of one per cent.

Additional Surtax Imposed

RCW 82.04.296 From and after the first day of May, 1955, there is levied and shall be collected from every person for the act or privilege of engaging in business activities, as a part of the tax imposed by this chapter, other than those activities taxed pursuant to RCW 82.04.260, an additional tax in the amount of sixty per cent of the tax payable under this chapter:

Provided, That from April 1, 1959 until July 1, 1961 the additional tax imposed under this section shall be in the amount of seventy-six per cent of the tax payable under this chapter. To facilitate collection of this additional tax, the tax commission is authorized to adjust the basic rates of persons to which this section applies in such manner as to reflect the exact amount of the additional tax hereby imposed.

ADMINISTRATION

Taxable as to Each Activity

RCW 82.04.440 Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: *Provided,* That persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240, or subsection (2) or (3) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold, and that persons taxable under RCW 82.04.240 shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

(2) With Respect to the Compensating Use Tax

DEFINITIONS

"Sale at Retail;" "Retail Sale" Defined

RCW 82.04.050 "Sale at Retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) other than a sale to one who (a) purchases for the purpose of resale as tangible personal property in the regular course of business, or (b) installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real

or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property, or (c) purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82.04.280, subsection (2), and 82.04.290.

The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, excluding, however, services rendered in respect to live animals, birds and insects; (b) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture; (c) the sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; (d) the sale of or

charge made for labor and services rendered in respect to automobile towing, armored car service and similar automotive transportation services, but not in respect to those required to report and pay taxes under chapter 82.16; (e) the sale of and charge made for the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same.

The term shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any publicly owned street, place, road, highway, bridge, or trestle which is used or to be used primarily for foot or vehicular traffic, nor shall it include sales of feed, seed, fertilizer, and spray materials to persons for the purpose of producing for sale any agricultural product whatsoever, including milk, eggs, wool, fur, meat, honey, or other substances obtained from animals, birds, or insects.

"Consumer" Defined

RCW 82.04.190 "Consumer" means the following:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property other than for the purpose (a) of resale as tangible personal property in the regular course of business or (b) of incorporating such property as an ingredient or component of real or personal property when installing, repairing, cleaning, altering, imprinting, improving, constructing, or decorating such real or personal property of or for consumers or (c) of consuming such property in producing for sale a new article of tangible

personal property or a new substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale;

(2) Any person engaged in any business activity taxable under RCW 82.04.290;

(3) Any person engaged in the business of contracting for the building, repairing or improving of any publicly owned street, place, road, highway, bridge or trestle which is used or to be used primarily for foot or vehicular traffic as defined in RCW 82.04.280, in respect, however, only to tangible personal property used or consumed in such business;

(4) Any person who is an owner, lessee or has the right of possession to or an easement in real or personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business, excluding only the United States, the state, and its political subdivisions in respect to labor and services rendered to their real property which is used or held for public road purposes.

RETAIL SALES TAX

Definitions

RCW 82.08.010 For the purposes of this chapter:

(1) "Selling price" means the consideration, whether money, credits, rights, or other property, expressed in the terms of money, paid or delivered by a buyer to a seller, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expenses whatsoever paid or accrued and

without any deduction on account of losses; but shall not include the amount of cash discount actually taken by a buyer;

(2) "Seller" means every person making sales at retail or retail sales to a buyer or consumer, whether as agent, broker, or principal;

(3) "Buyer" and "consumer" include, without limiting the scope hereof, every individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint-stock company, business trust, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise, municipal corporation, quasi-municipal corporation, and also the state, its departments and institutions and all political subdivisions thereof, irrespective of the nature of the activities engaged in or functions performed, and also the United States or any instrumentality thereof;

(4) The meaning attributed in the preceding chapter to the terms "tax year," "taxable year," "person," "company," "sale," "sale at retail," "retail sale," "sale at wholesale," "wholesale sale," "business," "engaging in business," "cash discount," "successor," "consumer," "in this state" and "within this state" shall apply equally to the provisions of this chapter.

COMPENSATING (USE) TAX

Definitions

RCW 82.12.010 For the purposes of this chapter:

(1) "Value of the article used" shall mean the consideration, whether money, credit, rights, or other property, expressed in terms of money, paid or given or con-

tracted to be paid or given by the purchaser to the seller for the article of tangible personal property, the use of which is taxable under this chapter. The term includes, in addition to the consideration paid or given or contracted to be paid or given, the amount of any tariff or duty paid with respect to the importation of the article used. In case the article used is acquired by lease or by gift or is extracted, produced, or manufactured by the person using the same or is sold under conditions wherein the purchase price does not represent the true value thereof, the value of the article used shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character under such rules and regulations as the tax commission may prescribe;

(2) "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state;

(3) "Taxpayer" and "purchaser" include all persons included within the meaning of the word "buyer" and the word "consumer" as defined in chapters 82.04 and 82.08;

(4) "Retailer" means every person engaged in the business of selling tangible personal property at retail and every person required to collect from purchasers the tax imposed under this chapter;

(5) The meaning ascribed to words and phrases in chapters 82.04 and 82.08, insofar as applicable, shall have full force and effect with respect to taxes imposed under the provisions of this chapter. "Consumer," in

addition to the meaning ascribed to it in chapters 82.04 and 82.08 insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services.

Imposition of Tax

RCW 82.12.020 There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, or acquired by lease, gift, or bailment, or extracted or produced or manufactured by the person so using the same. This tax will not apply with respect to the use of any article of tangible personal property purchased, extracted, produced or manufactured outside this state until the transportation of such article has finally ended or until such article has become commingled with the general mass of property in this state. This tax shall apply to the use of every article of tangible personal property, including property acquired at a casual or isolated sale, and including by-products used by the manufacturer thereof, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured or are available for purchase within this state. Except as provided in subdivision (2) of RCW 82.12.030, payment by one purchaser or user of tangible personal property of the tax imposed by chapter 82.08 or 82.12 shall not have the effect of exempting any other purchaser or user of the same property from the taxes imposed by such chapters. The tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate of three and one-third per cent: *Provided,* That from April 1, 1959 until July 1,

1961 the tax levied in this section shall be in an amount equal to the value of the article used by the taxpayer multiplied by the rate of four per cent.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1964

No. 566

MORRISON-KNUDSEN COMPANY, INC., THE HENRY J. KAISER COMPANY, PUGET SOUND BRIDGE & DRY-DOCK COMPANY, and GENERAL CONSTRUCTION COMPANY, d/b/a MORRISON - KAISER - PUGET SOUND-GENERAL, *Appellants*,

v.

THE STATE OF WASHINGTON, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

JOHN W. RILEY
Special Assistant Attorney General
320 Central Building
Seattle, Washington 98104

JAMES A. FURBER and
HENRY W. WAGER
Assistant Attorneys General
Temple of Justice
Olympia, Washington

Attorneys for Appellee.

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JAMES A. FURBER and
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Assistant Attorneys General
Temple of Justice
Olympia, Washington

Attorneys for Appellee

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v.

THE STATE OF WASHINGTON, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the Appellee respectfully moves that this Court enter an order dismissing the appeal on the grounds that this case does not present a substantial federal question.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Is the tax classification adopted by the Washington Legislature which distinguishes between

"public road contractors" and "general contractors" based upon reasonable grounds; or is the classification arbitrary and capricious and therefore discriminatory?

COUNTER-STATEMENT OF THE CASE

In order to construct the State of Washington's Hood Canal Floating Bridge, the Appellants (as successful bidder operating as a joint venture) were required to prefabricate a number of large pontoons[1] and anchor shells[2] in a shipyard and at outfitting docks which were owned by two members of the joint venture. Thereafter these segments of the bridge were towed to the bridge construction site, where they were eventually incorporated into the bridge.

The Washington Supreme Court found that the shipyard and graving dock operations conducted by the Appellants constituted "manufacturing" under provisions of the Washington Business and Occupation Tax. (Opinion: Jurisdictional St., pp. 28-29.)[3]

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[1]The pontoons (St. 6, 11) (Ex. 1, pp. 7-8, 37) were 360 feet long, 50 feet wide, and 14 feet 3⅛ inches in depth. Each pontoon was constructed of concrete reinforced by steel. Much of it was "stressed" during the course of manufacturing. Each pontoon is a honeycomb of watertight compartments with appropriate plumbing facilities for pumping and ballast. (Ex. 1, pp. 7-20.) (St. 10-11.)

[2]The anchor "shells" were immense cubicles constructed of reinforced concrete. They were also to be assembled in dry docks, then floated to the bridge site for preparation for and eventual incorporation within the completed bridge. (St. 18.)

[3]The term "manufacturer" is defined in RCW 82.04.110 as follows:

The tax assessment challenged by the Appellants included an amount of tax measured by Appellants' gross receipts from "manufacturing" at the Seattle dry docks and graving yards.[4]

Having manufactured the pontoons and anchor shells, the Appellants (as a joint venture) were held liable for the Washington Compensating Use Tax (RCW 82.12.010 and RCW 82.12.020), which tax is measured by the value of the articles "used". (See Opinion: Jurisdictional St., pp. 30-32.) The provisions of the Washington State Compensating "Use" Tax are held liable because the articles were manufactured by the taxpayer. If the taxpayer had purchased the pontoons from an independent contractor, a sales tax would have been applicable in an identical amount.[5] The constitutionality of this

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[4] "'Manufacturer' means every person who . . . manufactures . . . for commercial or industrial use from his own materials or ingredients any articles, substances or commodities. . . ."

The term "to manufacture" is defined in RCW 82.04.120 as embracing

". . . all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful substance or article of tangible personal property is produced for sale or commercial or industrial use, and shall include the production or fabrication of special made or custom made articles."

[5] If the member of the joint venture which owns the dry docks had prefabricated the pontoons and anchor shells as an independent contractor rather than as a member of the joint venture, it would obviously have been subject to the same manufacturing tax and in the same amount as here.

[6] Specifications included the standard "Specifications for Road and Bridge Construction" published by the Department of Highways. (Ex. 2.) This portiton of the specifications included a provision that:

"7.01B STATE SALES TAX

"for all contracts for the building, repairing or improving publicly owned streets, roads, etc., used primarily for foot or

tax was established by this Court in *Silas Mason Co. v. Tax Comm. of Washington*, 302 U. S. 186, 82 L. ed. 187, 58 S. Ct. 233 (1937).

The opinion of the Washington Supreme Court also upheld the State's classification of the Appellants as a "public road contractor" and the assessment for a business and occupation tax under the provisions of RCW 82.04.190.* (Opinion: Jurisdictional St., pp. 32-33.)

It is to be noted that Appellants have not and could not argue that they are being subjected to a "double" tax. No contention has ever been made that the rate of taxation is discriminatory. Rather, Appellants have challenged the assessment (a) on the grounds that the State law was misconstrued by the Appellee and (b) alternatively that there is no lawful basis for the classification "public road contractors" as distinguished from "general contractors".

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vehicular traffic as defined in Tax Commission Rule 171, *the Contractor is advised to include in his various unit bid prices, all Washington retail sales taxes to be paid by him on the sales to him of all materials, equipment and supplies, used or consumed in the performance of the contract.* Such sales are not for resale and are taxable against the Contractor. Contractor will *not* be required to collect the retail sales tax on the total contract price from the Department of Highways." (page 26) (Emphasis supplied.)

*The Appellants' "at site" construction activities included construction of approaches, foundations, piers, toll plaza, etc. and incorporation of the prefabricated articles into the final bridge structure. As appellants have noted, the final completion of the job was interrupted by a storm and release of the Appellants from completion of their contract.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

It will be observed that on analysis, Appellants' position must be reduced to the question of whether or not the classifications of the Washington Business and Occupation Tax statutes involved here rest upon some reasonable basis or policy consideration.[1] It must be conceded that the difference between classes of state statutes need not be great. Classification may be permissible if it is reasonably related to some lawful taxing policy of the state, such as greater ease or economy in the administration or collection of a tax, the selection of a fruitful source of revenue with the exemption of sources less promising, or the equalization of the burdens of taxation. If any such reasonable basis for the classification exists, or conceivably may exist, then the circumstance that there is a competition between a commodity or business which is taxed and some business or commodity which is not taxed, does not materially affect the validity of the classification.

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[1]The Appellants, at page 12 of the Jurisdictional Statement, contradict their own formulation of issues by suggesting that this appeal presents an issue as to whether a state is constitutionally required to assess taxes uniformly on all persons engaged in similar activities. The Appellee can of course concede that a state is, in general, required to assess taxes uniformly on all persons engaged in similar activities and submits that the facts of this case indicate that the taxes involved in this case were indeed and in fact assessed uniformly, and are assessed uniformly on all persons engaged in similar activities.

As this Court stated in *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464 (1931):

> "It is not the function of this Court in cases like the present to consider the propriety or justice of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. *Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great.* The decisions of the court make this abundantly clear." (Emphasis supplied.)

It must be obvious that there are necessary distinctions between public road contractors and general contractors. The State Supreme Court found so; the legislature believed it to be true. Public road contractors are engaged in a particular type of contract work which must be performed for public bodies. The latter are engaged in all types of construction, except public road building which is clearly in a class by itself. The legislature could properly exempt general contractors who are retailers from the manufacturer's tax, or requiring public contractors who are not retailers to pay such a tax. These distinctions have developed in the Washington State law as necessary functions of uniformity and as necessary adjuncts to collection policy, the wisdom of which the courts need not question, and should not question, unless it can be said that the taxpayer in question is being subjected to double taxation or unless it can be said as

a matter of law that the classification is arbitrary and capricious.

Beyond any legitimate controversy, the true mark of difference which is the basis of classification in this case does not deprive Appellants of equal protection of the law under the many decisions of this Court setting forth a test for reasonableness of classification in tax cases. *State Board of Tax Commissioners of Indiana v. Jackson*, supra; *A. Magnano Co. v. Hamilton*, 292 U. S. 40, 54 S. Ct. 599, 78 L. ed. 1109 (1934).

No substantial federal question forming a basis for review of a decision of a state supreme court is presented by a contention of invasion of a constitutional right, where the question has been settled by previous decision of this Court. This Court has considered the statutes in question here on many occasions.[8] The fundamental constitutionality of the statutes involved is unquestionable.

By the same token, the decision of the State Court is entirely in harmony with this Court's most recent pronouncements in the state tax field.[9] There are no "interstate commerce" ramifications in this case whatsoever.

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[8] *B. F. Goodrich Co. v. State*, 38 Wn. (2d) 663, 231 P. (2d) 325 (1951), cert. den. 342 U. S. 876 (1951); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939); *International Shoe Co. v. Washington*, 326 U. S. 310 (1945); *Norton Co. v. Department of Revenue*, 340 U. S. 534 (1951); *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602 (1951); *U. S. Steel Corp. v. State*, 51 Wn. (2d) 224, 316 P. (2d) 1099 (1957), cert. den. 358 U. S. 46 (1958); *Field Enterprises v. State*, 47 Wn. (2d) 852, 289 P. (2d) 1010 (1955), aff. per curiam 352 U. S. 806 (1956); *General Motors Corp. v. State*, 12 L. ed. (2d) 430;

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'Contrary to Appellants' weak assertion, or suggestion to the contrary, *Halliburton Oil Well Cementing Co. v. Reily*, 373 U. S. 64 (1963), and *General Motors v. State*, 12 L. ed. (2d) 430, are obviously unrelated to the classification issue here.

CONCLUSION

On the basis of the decision of the State Court and the prior opinions of this Court on classification under the 14th Amendment, no substantial federal question requiring further argument, or one of any public importance, is involved. This Appeal should be dismissed accordingly.

Respectfully submitted,

JOHN W. RILEY
Special Assistant Attorney General
320 Central Building
Seattle, Washington 98104

JAMES A. FURBER and
HENRY W. WAGER
Assistant Attorneys General
Temple of Justice
Olympia, Washington

Attorneys for Appellee.

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